

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

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COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2006-0042
)	2 CA-CR 2007-0259-PR
Appellee/Respondent,)	(Consolidated)
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
RICHARD LEARNED O'NEIL,)	Not for Publication
)	Rule 111, Rules of
Appellant/Petitioner.)	the Supreme Court
)	

APPEAL AND PETITION FOR REVIEW
FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR2005-00263

Honorable Silvia R. Arellano, Judge

AFFIRMED
REVIEW GRANTED; RELIEF DENIED

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Richard L. O’Neil was convicted after a jury trial of fraudulent schemes and artifices, theft of property valued at \$2,000 or more, and three counts of forgery. After the court found he had two historical prior convictions, it sentenced O’Neil to concurrent, presumptive prison terms on each count, the longest of which was 15.75 years. In this consolidated appeal and petition for review from the denial of post-conviction relief, O’Neil argues that the state presented insufficient evidence to support his convictions and that he raised a colorable post-conviction claim that his trial counsel was ineffective.

¶2 We view the evidence and the reasonable inferences therefrom in the light most favorable to sustaining the convictions. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). On July 29, 2004, a teller at a bank in Casa Grande brought O’Neil to the desk of Donna V., because O’Neil apparently sought a loan to buy a house. When O’Neil told her his name was “Richard L. O’Neil, Jr.,” Donna asked O’Neil if he had been in Tucson the day before trying to locate his account, and he responded that he had. The previous day Donna had received a telephone call from a teller at a Tucson branch trying to locate an account for a “Richard O’Neil,” but Donna had not been able to find the account. While speaking with O’Neil, Donna noticed he had a document containing several pages in his hands. Taking it from him to inspect, she determined it showed a transaction history for a checking account that belonged to O’Neil’s uncle “Rick” and brother “Jimmy.”¹

¹Donna testified she has personally known some members of the O’Neil family for a “[l]ong time.”

Donna did not give the document back to O’Neil, and it was later admitted at trial. The account-holder’s name listed on the document was “Richard P. O’Neil,” the name of O’Neil’s uncle.²

¶3 After Donna reviewed the document, O’Neil told her he was “supposed to be on the account” so he could assist Jimmy in paying bills. Upon looking up the account electronically, Donna told O’Neil his name was not on it. She informed him that, to add him to the account, all three “signers”—his brother Jimmy, his uncle Rick, and his father James—would have to come into the bank. During their interaction, O’Neil never referred to the possible existence of a second bank account. After O’Neil left the bank, Donna called Rick and asked if O’Neil was supposed to be on the account with Jimmy, to which Rick replied, “No. Hell[,] no,” and came immediately to the bank.³ Donna also discovered that, before her interaction with O’Neil, the teller had given him \$600 from the account.

¶4 The bank’s custodian of records, Michelle Johnston, testified “Richard O’Neil” had made three cash withdrawals from this account in the last weeks of July 2004. On July 23, he withdrew \$550; three days later, he withdrew \$1,900; and, finally, on July 29, he withdrew \$600. The number of a state identification card issued to “Richard Learned

²Appellant’s name is “Richard Learned O’Neil.” Because his father’s name is James T. O’Neil, Richard L. O’Neil cannot be a “Junior.” Nor does Richard P. O’Neil, appellant’s uncle, have a son named Richard, Jr.

³Rick testified he “was terrified” when he heard O’Neil was inquiring about the account because he did not trust O’Neil.

O’Neil” is written on all three withdrawal slips.⁴ Johnston also testified she could distinguish the letter “L” in the middle of the signature on each slip.

¶5 O’Neil’s brother Jimmy testified that O’Neil came and spoke to him at work and asked him to “get things straightened out” with the bank. When Jimmy replied that he would have to call Rick, O’Neil got “an intimidating look on his face and . . . just took off.”⁵ Jimmy did not see O’Neil after that day. Rick, who is a certified public accountant, testified he had been helping Jimmy with “financial guidance” since Jimmy began living on his own at age nineteen. He testified Jimmy has “congenital brain damage,” which causes him to read at a kindergarten level and renders him unable to work with numbers above thirty. Thus, Jimmy, his father, and his uncle Rick had opened the account in 1991 so Rick could deposit Jimmy’s paychecks and monitor his spending. Rick stated that Jimmy had been “duped a couple of times” into buying things for more than they were worth.

¶6 O’Neil called Rick several days after Rick had learned of the withdrawals. O’Neil admitted the bank had wrongly given him money from Jimmy’s account but blamed it on the bank’s error. Then O’Neil stated he had an account at the same bank into which he regularly deposited money. When Rick suggested the two go to the bank the next day and fix the mistake by simply transferring money from O’Neil’s account back into Jimmy’s,

⁴Although Johnston testified the number was a “driver’s license number,” the actual withdrawal slips list the number preceded by “AZID.”

⁵Rick testified he talked to Jimmy on the telephone regarding this incident on July 29, 2004, the same day O’Neil had made the third withdrawal from Jimmy’s account.

O'Neil responded that there was actually no money in his account. O'Neil told Rick he thought his father had put money into an account for him. When Rick pressed him further, O'Neil stated his father had not given him permission to withdraw any money but had been planning to give it to him and, in any event, he believed he would inherit the money eventually. Finally, when Rick told O'Neil he had informed the police about the withdrawals, O'Neil "became very upset" and threatened his uncle before hanging up the telephone.

¶7 On cross-examination, Rick testified about a conversation with O'Neil's father, in which James stated he had opened a joint account with O'Neil at one time, but "then he had [O'Neil]'s name taken off of that account." Rick believed James had done so "fairly recently," but did not know exactly when. When James and O'Neil had gone into the bank to have O'Neil's name removed, the bank had erroneously "called up" Jimmy's account first, thus alerting O'Neil to the existence of Jimmy's account.

¶8 At the noon recess on the first day of trial, O'Neil's counsel alerted the court that she had received "a faxed copy of a bank statement" that morning from O'Neil's father. She moved to admit the document as proof of an account in James's and O'Neil's names, but the court denied her motion. She also moved the court to allow James to testify telephonically or for a recess so James could testify in person about the existence of that account. The court also denied these motions, admonishing her for not subpoenaing all

potential witnesses. But the court allowed her to mark the exhibit so that, if O’Neil testified, defense counsel could use it, if necessary, to refresh O’Neil’s recollection about the account.

¶9 After the close of the state’s evidence, O’Neil moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., arguing the state had not proven he had intended to take money out of Jimmy’s account. The court denied the motion. On the second day of trial, in O’Neil’s absence, the jury convicted him of all charges.

¶10 O’Neil later filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., alleging trial counsel had been ineffective in violation of O’Neil’s rights under the Sixth Amendment to the United States Constitution. He attached bank records that verified the existence of the second account in July 2004. He also attached an affidavit from James confirming that James had opened a joint account with O’Neil in 2003. James stated that, if he had known “no evidence concerning the existence of th[e] account was properly and thoroughly presented to the jury during the course of th[e] trial,” he would have made arrangements to testify at trial. He also avowed that, had he been present to testify, he would have clarified Rick’s “misstate[ments]” and “improper assumptions” about their conversations, and “a proper and complete picture would have been presented to the jury for [its] just consideration.” The trial court summarily dismissed his petition. This appeal and petition for review followed and were consolidated by this court.

APPEAL

¶11 O’Neil argues the state failed to prove an essential element of his convictions: the intent to take money from Jimmy’s account. When reviewing a conviction for insufficient evidence, we will affirm the conviction if “substantial evidence” supports the guilty verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). “If reasonable [people] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.” *State v. Bearden*, 99 Ariz. 1, 4, 405 P.2d 885, 886 (1965); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (relevant question in review of sufficiency of evidence to support conviction is if “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt”).

¶12 The statute prohibiting fraudulent schemes and artifices provides that a person violates the statute if, “pursuant to a scheme or artifice to defraud, [that person] knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions.” A.R.S. § 13-2310(A).⁶ A person commits forgery by presenting, with an intent to defraud, an instrument containing false information. A.R.S. § 13-2002(A)(3).

⁶Although the express language of § 13-2310(A) does not require the state to prove an “intent to defraud” or “intent to deprive” as do the forgery and theft statutes, respectively, *see* A.R.S. §§ 13-2002(A) and 13-1802(A)(1), our supreme court has recognized that our fraudulent schemes and artifices statute, modeled after the federal mail fraud statute, “requires proof of the specific intent to defraud.” *State v. Haas*, 138 Ariz. 413, 418, 675 P.2d 673, 678 (1983). O’Neil’s challenge to his convictions under all three statutes is entirely based on his claimed lack of intent to take money from Jimmy’s account.

And a person commits theft by knowingly controlling property of another with the intent to deprive the person of the property. A.R.S. § 13-1802(A)(1).

¶13 O’Neil essentially argues there was insufficient evidence of each of the charges because he “believ[ed] that he was obtaining money from an account opened for him and his father [and] had no way of knowing that the Bank was actually taking the money from his brother’s account.” In support of this argument, he emphasizes that (1) the teller, and not he, apparently filled out the withdrawal slips and (2) he may at one time have had a joint account with his father at the bank.

¶14 In assessing whether the evidence was sufficient to convict O’Neil of the charges, we resolve all conflicts in the evidence “in favor of sustaining the verdict and against the defendant.” *Guerra*, 161 Ariz. at 293, 778 P.2d at 1189. And we leave exclusively to the jury questions of the credibility of witnesses and the weight to be given their testimony. *State v. Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d 265, 269 (2007). The state demonstrated that, within a one-week period, O’Neil made three large withdrawals, totaling \$3,050, from Jimmy’s account. It also presented ample evidence from which a jury could reasonably infer that O’Neil knew the account was Jimmy’s either when he made the withdrawals or, at the latest, immediately thereafter.⁷ O’Neil received from the bank teller documents pertaining

⁷A jury may reasonably infer a defendant’s consciousness of guilt from the defendant’s actions after the alleged crime. *See, e.g., State v. Greene*, 192 Ariz. 431, ¶ 21, 967 P.2d 106, 113 (1998) (letter in which defendant did not challenge veracity of witness’s recorded statement to police but “was concerned only about [witness’s] informing on him” relevant evidence of consciousness of guilt); *State v. Styers*, 177 Ariz. 104, 112-13, 865

to the account from which he had just withdrawn money that bore only his uncle's name. He referred to that account as "Jimmy's account" when talking to Donna and said he used the money in the account to help Jimmy pay bills. After making the last withdrawal, O'Neil went to Jimmy's workplace and asked Jimmy to "get things straightened out" with the bank, then got angry and left when Jimmy stated he would have to call Rick. Finally, O'Neil called Rick, admitted the money he had withdrawn was not his, admitted he had no money in any account of his own, and threatened his uncle when Rick told him the police had been called. From this, the jury could have found beyond a reasonable doubt that O'Neil had known he was withdrawing money from Jimmy's account rather than any joint account he held with his father. We find no error.

PETITION FOR REVIEW

¶15 O'Neil argues he presented a colorable claim, pursuant to Rule 32, that he was denied effective assistance of counsel. We review for an abuse of discretion a trial court's dismissal of a claim for post-conviction relief without an evidentiary hearing. *State v. Donald*, 198 Ariz. 406, ¶¶ 7-8, 10 P.3d 1193, 1197-98 (App. 2000). However, a trial court abuses its discretion by summarily dismissing a petition for post-conviction relief if the

P.2d 765, 773-74 (1993) (defendant's attempts to influence witnesses' testimony relevant to show consciousness of guilt); *State v. Valencia*, 186 Ariz. 493, 502, 924 P.2d 497, 506 (App. 1996) (defendant's use of intimidation to silence witnesses evidenced consciousness of guilt); *State v. Crane*, 166 Ariz. 3, 7, 799 P.2d 1380, 1384 (App. 1990) (defendant's attempts to change testimony of victim and another witness showed consciousness of guilt).

petitioner's allegations, taken as true, might have changed the outcome of the case. *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990).

¶16 To prevail on a claim of ineffective assistance of counsel, a defendant must prove counsel's performance was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). A deficient performance is one that falls "below an objective standard of reasonableness" in light of "prevailing professional norms." *Strickland*, 466 U.S. at 687-88. In assessing an attorney's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Although O'Neil lists all aspects of his counsel's performance that he alleges were deficient, he provides supporting argument and authority only for his contention that counsel did not conduct a reasonable investigation. *See* Ariz. R. Crim. P. 32.9(c)(1)(iii) (petition for review must comply with rule governing form of appellate briefs and contain "facts material to a consideration of the issues presented for review"); Ariz. R. Crim. P. 31.13(c)(1)(vi) (briefs must contain argument and supporting authority). Specifically, O'Neil contends his counsel "failed to thoroughly investigate whether there was another open account with [the bank] that had been opened by [hi]s father."

¶17 The state's response to O'Neil's Rule 32 petition included an affidavit from trial counsel, which was based on records of her contact with O'Neil. Counsel stated in the affidavit that O'Neil was generally difficult to communicate with and had never mentioned

the existence of a second bank account or that his father might be an important witness on that subject. The day before trial, James allegedly called counsel and mentioned for the first time the account he had opened with O'Neil. Counsel avowed she then did everything she could to get the evidence before the jury. *See Strickland*, 466 U.S. at 691 (“The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.”); *State v. Engram*, 171 Ariz. 363, 368, 831 P.2d 362, 367 (App. 1991) (trial counsel not ineffective for failing to interview witnesses when defendant never gave counsel names of possibly important witnesses).

¶18 But even assuming counsel’s performance was deficient, O’Neil has not shown “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. The jury heard other evidence demonstrating the existence of the second account and that the bank had confused the accounts in the past. Moreover, the account information O’Neil attached to his petition does not list him as an owner of the account; rather, his name appears under “customers to be added later.” Finally, his trial counsel’s file notes indicate James had told her O’Neil had been taken off the second account at some point, which is consistent with Rick’s testimony. Thus, O’Neil has not demonstrated that the information he claims his counsel deficiently failed to present would have materially aided his defense. And, as discussed, the state presented substantial evidence from which a jury could infer that, whether or not a second account existed, O’Neil had knowingly removed the funds from

Jimmy's account. Therefore, neither James's testimony about the existence of the second account nor the bank records were likely to have changed the outcome of the trial. We find no abuse of discretion in the trial court's summary dismissal of O'Neil's petition for post-conviction relief.

¶19 For the foregoing reasons, we affirm O'Neil's convictions and, although we grant the petition for review of the trial court's dismissal of his Rule 32 petition, we deny relief.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

J. WILLIAM BRAMMER, JR., Judge